

**OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management**

**MEMORANDUM OM 11-05**

**October 15, 2010**

**TO:** All Regional Directors, Officers-in-Charge,  
and Resident Officers

**FROM:** Richard A. Siegel, Associate General Counsel

**SUBJECT:** Quality Committee's Report on Selected  
FY 2009 Litigation Wins and Losses

In support of his priority that casehandling in the Field be conducted consistent with the highest quality standards, the General Counsel formed a Field committee (Quality Committee) to review all facets of casehandling quality. Annually, one of the committee's tasks is to evaluate the quality of our litigation program. To this end in FY 2010, the committee carefully reviewed and evaluated 24 cases litigated in FY 2009 in which the complaint was dismissed in its entirety after a hearing before an administrative law judge or on exceptions to the Board. The Committee also reviewed and evaluated 11 administrative law judge's decisions issued in FY 2009 in which a Region litigated a case and won portions of the outstanding complaint, but also lost significant portions of the complaint. The Committee also reviewed and evaluated 12 cases in which the allegations of the complaint were won in full before an administrative law judge in FY 2009. After careful deliberation and discussion, the Committee drafted the attached report that summarizes some lessons learned from this review of selected litigation wins and losses and makes recommendations for maintaining a high quality litigation program.

All Regional managers, supervisors and employees should carefully review this report on selected FY 2009 litigation wins and losses. The report should be the subject of a Regional training session to be held during the next four months. In this regard, the Quality Committee is preparing a PowerPoint presentation that can be utilized for the training, which will be available on the Operations page of Surfboard by the middle of October 2010. We hope this report will assist all Regions in achieving the highest quality standards in litigating cases on behalf of the General Counsel.

I want to take this opportunity to thank the twelve members of the Quality Committee for their excellent work on this important project.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy or the undersigned.

/s/  
R.A.S.

Attachments  
cc: NLRBU

**MEMORANDUM OM 11-05**

**UNITED STATES GOVERNMENT**  
**National Labor Relations Board**  
**Memorandum**



DATE: September 29, 2010

TO: Lafe Solomon, Acting General Counsel  
John E. Higgins, Jr., Deputy General Counsel

THRU: Richard A. Siegel, Associate General Counsel  
Anne G. Purcell, Deputy Associate General Counsel

FROM: FY 2010 Quality Committee (Rosemary Pye, RD, R-1; Rochelle Kentov, RD, R-12; Joseph Barker, RD, R-13; Martha Kinard, RD, R-16; Karen Fernbach, RA, R-2; William A. Baudler, RA, Region 32; Paul Murphy, ARD, R-3; Leonard J. Perez, Deputy O-I-C, SR-33; Richard Wainstein, SA, R-4; James G. Paulsen, AGC, Ops-Mgmt.; Charles L. Posner, DAGC, Ops-Mgmt.; and Dorothy D. Wilson, DAGC, Ops-Mgmt.)

SUBJECT: Quality Committee's Report on Selected  
FY 2009 Litigation Wins and Losses

As part of our ongoing work, the Quality Committee carefully reviewed selected litigation wins and losses from FY 2009. The Committee's review is designed to identify significant lessons that can be used to improve future litigation.

In FY 2009, the litigation success rate was 89.8%. As of end of August 2010, the litigation success rate for FY 2010 is 92.3%.<sup>1</sup> These litigation success rates confirm that Regions are doing a superb job of litigating cases before administrative law judges and the Board. The Committee congratulates Regions for their high quality work in litigating complaint cases.

The Committee reviewed 24 cases litigated in FY 2009 in which the complaint was dismissed in its entirety after hearing — 6 losses before the Board<sup>2</sup> and 18 losses before administrative law judges. The Committee also reviewed 11 administrative law judges' decisions in which a Region litigated a case and won portions of the outstanding complaint, but also lost significant portions of the complaint. To ensure that we also drew lessons from successful litigation, the Committee also reviewed 12 cases in which the allegations of the complaint were won in full before the administrative law judge.

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<sup>1</sup> This litigation success rate is higher than in past years. However, it should be recognized that this rate includes any case in which one or more allegations of the complaint are won, including those in which substantial and significant portions of the complaint may have been lost.

<sup>2</sup> Losses before the Board include only those cases where the General Counsel filed exceptions to a loss before an administrative law judge or the Region was defending against exceptions filed by a respondent to a victory before an administrative law judge. If the charging party filed exceptions to a loss before an ALJ but the General Counsel did not, the case is not counted as a loss in the litigation success rate.

The Committee generally confined its review solely to the Board or administrative law judges' decisions and any available memoranda from Regional Offices explaining the losses. Although identifying the reasons for a full or partial loss is difficult, the Committee identified some important areas where attention would seem likely to improve our litigation results. The Committee also reached consensus on some significant lessons from the review of litigation successes.

Based on our review, the Committee recommends that Regions consider the following suggestions to maintain a high quality litigation program: a) give "big cases" the resources, leadership, and planning they need; b) analyze bargaining allegations in context; c) consider all open cases against a respondent; d) effectively handle ULPs accompanied by a strike; e) address *Johnnie's Poultry* violations; f) present a consistent, coherent version of events; g) explain on the record the failure to call an important witness; and h) when considering exceptions, "Know when to hold 'em and know when to fold 'em."

### **A. Give "Big Cases" the Resources, Leadership, and Planning They Need**

Some trials involve fact-intensive and high-impact allegations that are vigorously contested by the respondent and can be expected to take more than two weeks of hearing before administrative law judges. These "big cases" have their own dynamic and require special preparation. Based on the lessons learned in some great wins in big cases the Committee reviewed this year, the following suggestions are offered for successful litigation of big cases.

#### **1. Commit the needed resources by assigning extra trial counsel and other staff to assist them**

A big case often expands at the litigation phase, when high-powered defense counsel may try to overwhelm the Region. Before litigation begins, line up the resources that may be needed, such as trial attorneys, paper or electronic document reviewers, and support staff or contractors for scanning and copying. Scrambling for these resources after the trial has begun can place the Region at a serious disadvantage.

When assigning trial counsel to a big case, ensure that the case is not solely dependent on one person, who may have a family or health emergency or otherwise become unavailable, and that enough attorneys are assigned to handle the witnesses and ancillary issues such as subpoenas and motions. A big case may take several months to complete with multiple continuances due to scheduling conflicts, subpoena disputes, motions requiring responses and rulings, requests for special permission to appeal, numerous witnesses, and lengthy cross-examinations. Extensions of time for briefs could add more months. In all, the time from trial preparation to brief-filing for a three-week trial could easily stretch to six months or more. Leaving this case entirely in the hands of one trial counsel, no matter how dependable, puts the Region's case at risk should counsel become unavailable. The Region should be prepared to move forward expeditiously on its high impact case despite the departure of a trial attorney. Assigning multiple trial counsel not only spreads the workload, but helps ensure continuity.

Big cases can generate ancillary litigation over subpoenas or 10(j) injunctions. Ample staffing will permit someone already involved in the trial to handle these matters while other trial counsel proceed with the trial before the ALJ. Big cases often involve multiple charges that continue to be filed as the earlier-filed cases head to trial. Assigning extra agents to the trial effort will enable the existing team to handle new complaint allegations if added to the ongoing litigation.

Utilizing field examiners as part of the litigation team, especially if they were involved in the investigation, may prove beneficial. The field examiner, as the person closest to the facts of the case, can provide unique insights as to reliability of witnesses, help trial counsel obtain and present all relevant evidence, and review documents while the trial is underway.

Finally, sharing the experience of litigating big cases with as many trial attorneys as possible is beneficial to the additional attorneys and to the Agency because it prepares them to handle similar cases and issues in the future. It will also benefit field examiners to assist in the litigation effort, especially if they were involved in the investigation, so that they can better understand the impact at trial of choices and decisions made during the investigation.

If resources are not available within the Region, the Division of Operations-Management should be consulted regarding the assignment of additional resources from outside the Region.

## **2. Assign a coordinator**

In a big case involving multiple Regional staff or multiple Regions, it helps to assign a coordinator to have a big picture perspective, to act as a sounding board and clearinghouse for information, to make sure everyone is on the same page, and to monitor closely the trial's progress and what evidence has been presented. This coordinator should have the authority and the time to assign work, issue directions, resolve differences among the trial attorneys on a day-to-day basis, and go directly to Regional management for decisions on significant issues. Performing these kinds of coordination functions can be very difficult for a lead trial attorney who must present witnesses, attend the trial, and focus intensively on his or her portion of the case. A supervisory attorney not at the trial each day may be a good option to serve as the trial coordinator.

A coordinator can also be critical at the brief-writing stage. With multiple trial counsel involved in drafting the brief, the coordinator can make the writing assignments, set and enforce deadlines, maintain a dialog among the drafters, see that they have the necessary resources to ensure completeness and consistency, and "sew" the separately written brief sections together. The coordinator can also make sure that the trial record is scanned and saved in an electronic format so that all brief drafters can have simultaneous access to the record.

## **3. Maintain a written "roadmap" that all trial counsel and other staff can follow**

Pre-trial briefs are just as important, if not more so, in a big case as in a normal case. It is essential to have a "proof plan" so that everyone is clear on how each part of the case will be proven and which trial attorney is responsible for each piece of evidence. Attorneys who are following the trial brief also need to keep a record of their progress on their parts of the case. As noted above, it is always possible that a trial attorney will depart. Thus, it is always important to take notes and leave things so that someone else can step in and successfully litigate the case.

## **4. Be prepared for subpoena disputes and obtaining electronically stored information**

Subpoena disputes can cause major delays in litigation and absorb large amounts of trial counsel's time. When issuing a subpoena to a respondent, carefully consider what may happen if the respondent petitions to revoke some or all of it. Make sure each subpoena request is clearly articulated, and that the Region knows exactly why it needs each item requested. If the subpoena is extensive and compliance is likely to be burdensome or time-consuming, consider what the Region

needs to have first in order to proceed with its case, and what the Region can live without if compliance is delayed or successfully challenged. If the Region makes a large request for electronically-stored information (ESI), know what format is needed or preferred, make a specific request for that format, and make sure the Region will have the technology and expertise to review the ESI when it is provided. Consulting with the Office of the Chief Information Officer (OCIO) on such issues may be very helpful.

#### **5. Despite the multitude of peripheral distractions in a big case, trial counsel should focus on the essential**

Big cases present special administrative difficulties: copying large quantities of documents, shepherding large numbers of witnesses, and responding to motions and petitions to revoke subpoenas. Well-staffed respondent counsel can use these peripheral issues to “stretch thin” and distract the General Counsel’s trial team. These potential difficulties should be anticipated and planned for with adequate resources and staff, so that trial counsel can focus on presenting the key elements of the General Counsel’s prima facie case and attacking the respondent’s primary defenses. Trial counsel should not be so overwhelmed with side issues that they cannot keep the “big picture” in mind. Nor should counsel let respondent get them side-tracked about matters that are not essential. Thus, establishing a trial team that includes, at a minimum, a coordinator, lead attorney, and support staff dedicated to the effort will improve our ability to handle these cases.

### **B. Analyze Bargaining Allegations in Context**

In a number of bargaining decisions reviewed by the Committee, there was an argument for finding the conduct to be violative, but, taken in context, the case should have been dismissed or handled through a merit dismissal. The Committee provides the following substantive and procedural tips for developing the big picture in these cases to complete the analysis.

#### **1. Correlative Bargaining Obligations: Do not overlook the conduct of the charging party**

The conduct of the union/charging party must be given as much attention as that of the employer/charged party.<sup>3</sup> Longstanding Board law requires that the conduct of both sides be examined to determine whether there is a violation. Bargaining obligations are sometimes described as correlative, and the charging party may be faulted for not putting the charged party to the test. This concept was described as early as 1947, pre-Taft-Hartley, when there was no bargaining duty placed on unions. In *Times Publishing Co.*, 72 NLRB 676, 682-683 (1947), the Board reversed the trial examiner (ALJ) and found no violation by the respondent employer because of the union’s failure to bargain, stating:

[T]he test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that, although the Act imposes no affirmative duty to bargain upon labor organizations, a union’s refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the

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<sup>3</sup> Because the cases reviewed were filed by unions, we will cast the charging party as the union and the respondent as the employer, but the principles apply equally when the parties are reversed.

employer's good faith can be tested. If it cannot be tested, its absence can hardly be found.

Even where the union has not committed any violations, counsel for the General Counsel may not be able to prove the employer failed to bargain in good faith if the union failed to test the employer's position.

## **2. Surface Bargaining**

### **a. Substantive law**

(1) Look beyond the presence of concessionary proposals. In *Reichhold II*,<sup>4</sup> the Board made clear that it will look at bargaining proposals in its examination of whether the bargaining was in good faith. Nevertheless, concessionary proposals alone are not enough to find a violation.

(2) Look for away-from-the-table violations, such as unilateral changes, a failure to give information, or discrimination against members of the bargaining committee, to have more than mere proposals in assessing whether or not bargaining has been in good faith.

(3) Determine if the union has put the employer to the test or has impeded bargaining, for example, by dilatory tactics, inflammatory conduct at the table, or the failure to make proposals or counterproposals.

(4) Determine if the subjects that allegedly caused the impasse were shown to be of sufficient significance to the parties to create impasse.

(5) If the proposal involves union funds or health insurance, consider supplementing the evidence from the parties by getting evidence directly from representatives of the funds or insurance agency, who may be more knowledgeable about the issues and more credible as experts and neutrals in the investigation and at trial. For example, the insurance company representative may be able to provide probative evidence about what is mandated by the insurance plan as it relates to one of the parties' benefit proposals.

### **b. Investigatory procedures**

(1) Require both sides to provide their bargaining notes. No matter how poor the notes are, it is difficult to reconstruct bargaining without notes. Consider dismissing

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<sup>4</sup> *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988), petition on review denied in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990), held that the Board will "examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." Thus, in *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11<sup>th</sup> Cir. 1984), cert. denied 469 U.S. 1035 (1984), the Board found a violation of Section 8(a)(5) based upon the ALJ's finding that the employer's proposals "would strip the Union of any effective method of representing its members." 265 NLRB at 859, quoting from *San Isabel Electrical Services*, 225 NLRB 1073, 1080 (1976).

for lack of cooperation if the charging party does not provide the notes;<sup>5</sup> and subpoena the charged party's notes if they are not provided voluntarily. If notes from either party are produced for the first time at trial, there will likely be insufficient time to analyze them adequately, and they may reveal significant information that should have been taken into consideration in making the initial determination of the merits of the charge. For these reasons, if cooperation is not forthcoming during the investigation, subpoena the notes of all bargainers.

(2) Make sure affidavits from bargaining committee members reference all written correspondence between the parties about the bargaining, the notes, and the proposals, with an explanation for any inconsistencies.

(3) Do not limit the investigation to an affidavit from the charging party's chief negotiator or note taker. Supplement the lead affidavit on the bargaining with affidavits from others on the bargaining team that at least address issues that may be in dispute.

(4) Solicit affidavits from the charged party. Bargaining notes may be incomplete, misleading, or biased. They need to be explained by testimony from as many witnesses as possible to capture the complexities of bargaining. Consider whether it is necessary to issue an investigative subpoena to such witnesses.

### **c. Trial procedures**

Avoid taxing your witnesses' memories, improve accuracy, and expedite the trial by getting stipulations on the dates of the meetings, the correspondence, and the proposals. Use those stipulations and documents to guide your witnesses. In some cases, it may even be possible to stipulate to the accuracy of one party's bargaining notes. If it would be helpful, chart the development of the issues and proposals for the ALJ in a written summary. Counsel for the General Counsel will need to seek a stipulation from opposing counsel in order to introduce a summary as an exhibit. If not, the summary may need to be a part of the counsel for the General Counsel's post-trial brief. Give a helpful opening statement to provide a roadmap for the ALJ. Provide a detailed, accurate, comprehensive, and objective post-hearing brief that will allow the ALJ to focus on the analysis rather than have to piece together the facts.

## **3. Unilateral Changes**

### **a. Check the threshold requirements**

(1) Be sure there is no 10(b) problem by ascertaining when the union knew or should have known of the change. Particularly when there are multiple unilateral changes at different times, 10(b) should be closely examined.

(2) Determine if the representative who learned of the change was an agent for that purpose.

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<sup>5</sup> If the charging party testifies that no notes were kept, the case cannot be dismissed on that basis, but it may well be hard to prove a violation. If the charging party does not have notes, but the charged party does, and those notes support its position, the Region will need to have a good theory for why it should proceed, if the case turns on credibility.

- (3) Decide if any alleged change was privileged by the contract.
- (4) If the contract has expired, decide what obligations and waivers survive.
- (5) Make sure the change is material, substantial, and significant.<sup>6</sup>

**b. Closely examine respondent's defenses**

If the employer contends that it bargained to impasse over the change, ask the union how, in its view, the bargaining fell short of bargaining to impasse. Were there alternatives the union was precluded from presenting? Sometimes, the change covers a narrow topic with little room for negotiation, and the employer may have satisfied its obligation on the basis of limited bargaining. At other times, the union is unequivocally opposed to any change and does not put the employer's willingness to bargain to the test. If the union cannot identify any alternative, this fact suggests the parties may have been at impasse. If the case goes to trial and the union witness cannot answer on cross-examination what proposal it was prepared to make or how it was precluded from making that proposal, the case may be undermined or lost.<sup>7</sup>

**c. Consider whether the 8(a)(5) conduct is also a violation of 8(a)(3)**

If the alleged 8(a)(5) conduct would constitute a violation of 8(a)(3), the employer cannot offer as a defense that it satisfied its duty to bargain.<sup>8</sup>

**4. Bargaining Over the Decision and Effects**

In applying *Fibreboard*,<sup>9</sup> *First National Maintenance*,<sup>10</sup> or *Dubuque*,<sup>11</sup> obtain the necessary information from the employer about how the decision was made and what evidence was relied upon. If the employer does not provide it, issue an investigative subpoena and consider if it is necessary to subpoena the decision maker to be able to analyze the decision correctly, because most of the evidence is in the possession of the employer. The evidence of the management decision is too complex to wait for a trial subpoena, which will not provide adequate time for analysis and follow up.

Differentiate between whether the union has asked to bargain over the decision or effects or both. An accompanying information request may shed light on this issue. If it is concluded that there was no obligation to bargain over the decision, it is necessary to determine if there was a separate request to bargain over the effects.<sup>12</sup> In some cases, the employer may have offered to bargain over the effects, but the union may not have taken up that offer, if it was focusing on the information request or decision bargaining.

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<sup>6</sup> *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005).

<sup>7</sup> This same test for whether or not there has been good-faith bargaining and whether or not impasse has been reached applies equally to other bargaining cases.

<sup>8</sup> *International Paper Co.*, 319 NLRB 1253, 1275 (1995), enf. denied on other grounds, 115 F.3d 1045 (D.C. Cir. 1997).

<sup>9</sup> *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964).

<sup>10</sup> *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

<sup>11</sup> *Dubuque Packing Co. (II)*, 303 NLRB 386 (1991).

<sup>12</sup> Conversely, if there is an obligation to bargain over the decision, the request to bargain subsumes the request to bargain over the effects.

There are sometimes concerns about whether the General Counsel can subpoena information about the decision, if that would appear to be achieving the remedy the union has sought in a related information case. That will not be a problem, however, if the timing of the request makes it clear that the union was requesting information for the purposes of bargaining rather than to develop evidence in support of its ULP charge.

## **5. Bargaining Over Non-mandatory, Permissive, or Illegal Subjects**

- Be alert to proposals that present a complex combination of mandatory and permissive subjects that may warrant submission to Advice.
- Determine if any condition alleged to be violative was expressed in writing. It may be difficult to establish that an agreement on mandatory subjects was conditioned on agreement on permissive or illegal proposals, unless the condition was expressed in writing.
- Develop the significance of the issues to the parties where it is alleged that there was bargaining to impasse on permissive or illegal subjects. For example, if a party made a proposal on a permissive subject, but thereafter the bargaining between the parties focused solely on the mandatory bargaining subject of granting a wage increase, it would be difficult to argue that the making of a permissive proposal tainted the bargaining or prevented the parties from reaching a good faith impasse.

## **C. Consider All Open Cases Against a Respondent--Including Pending Compliance Cases**

Another one of the litigation losses reviewed this year highlighted the need to carefully consider all open cases involving a respondent that are pending in the Region, including any open compliance cases. Evidence obtained from a respondent during the investigation of a related compliance case may and often does have an impact on the merits of a subsequently filed ULP charge. More importantly, reviewing these related files allows the Regional Director a better understanding of any defenses being raised. Board agents should include a report on the status of such related cases in the final investigative report so that the current charges are not considered in a vacuum. In addition, it is a best practice to invite the compliance officer to participate in the agenda of the related investigation in order to ensure that all relevant material is considered in deciding whether to issue complaint on any of the new charges involving the same respondent. It is also helpful to get the compliance officer's perspective on whether the complaint should be consolidated with the compliance specification. OM Memorandum 07-59 (CH), "Consolidated Compliance Issues with ULP Complaints – Expediting Casehandling in 'Default Cases,'" dated May 17, 2007.<sup>13</sup>

## **D. Effectively Handle ULPs Accompanied By a Strike**

One of the litigation losses reviewed highlighted the necessity for careful handling of cases involving strikes. If unfair labor practices are accompanied by a strike, it must be determined if the evidence is sufficient to support a finding of an unfair labor practice strike. In the case of an unfair labor practice strike finding by the Region, in order to preserve the recall rights of strikers, a

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<sup>13</sup> Please note that a decision to consolidate the compliance case with the complaint does not require simultaneous issuance of the compliance specification. The compliance specification can be consolidated later.

settlement agreement must provide for their recall rights in the event of a failure or refusal to properly reinstate them. This applies even in situations where an unconditional application for reinstatement has not been made. Similarly, the status of an unfair labor practice strike must be alleged in a complaint even if there has not been any discrimination against strikers by discharging or refusing to reinstate them. The complaint should also request an open-ended order requiring the reinstatement, upon application, of all qualified strikers. (See Pleadings Manual, Sections 600.1(b), fn. 1, and 1000; Casehandling Manual, Section 10266.2.) Once an unfair labor practice strike is alleged, counsel for the General Counsel must be careful to present sufficient evidence to establish a causal connection between the unfair labor practices and the strike. This can be accomplished by direct evidence of what the union told employees when a strike vote was held or the totality of the circumstances that led to the strike. See generally *C-Line Express*, 292 NLRB 638 (1989). Failure to fulfill these requirements can result in forfeiture of the strikers' statutory rights.

#### **E. Address *Johnnie's Poultry* Violations**

The Committee repeatedly encountered cases in which potential violations of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), had come to light during trial and yet, no attempt was made by counsel for the General Counsel to amend the complaint to allege such violations.<sup>14</sup> Recognizing a *Johnnie's Poultry* violation and properly addressing it is important, not only because it ensures that the violation is remedied, but also because exposing the violation may help in discrediting the witness whose testimony was arguably tainted by the employer's unlawful conduct. Whenever possible, potential *Johnnie's Poultry* violations should be covered with witnesses during pre-trial preparation.

While a Region may ultimately have strategic reasons for not amending the complaint, such as concerns about possible delay, it is nonetheless important that counsel for the General Counsel be alert during a trial to the possibility of a *Johnnie's Poultry* violation when an employee witness has been called to testify on behalf of an employer. In such circumstances, counsel for the General Counsel should thoroughly cross-examine the employee witness as to whether the employer met with the witness prior to trial regarding that witness' testimony and, if so, whether the employer complied with the *Johnnie's Poultry* safeguards. When that cross-examination exposes a potential violation, counsel for the General Counsel should immediately bring it to the attention of Regional management for timely consideration as to whether to amend the complaint. The complaint should be amended at trial rather than waiting until after the record closes, given that such a delay could result in the motion to amend being denied on the basis of the employer not having had an opportunity to address the allegation during the trial.

#### **F. Present a Consistent, Coherent Version of Events**

In its September 30, 2009 memorandum reviewing FY 2008 Litigation Wins and Losses (OM 10-06 dated October 7, 2009), the Committee emphasized the importance of utilizing the most

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<sup>14</sup> Although an employer has the right, when preparing its defense to pending unfair labor practice allegations, to question its employees about the protected activity at issue in those allegations, that right is circumscribed by the safeguards set forth in *Johnnie's Poultry*. Thus, if an employee is being questioned about protected, concerted activity, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain the employee's participation on a voluntary basis; the questioning must occur in an atmosphere free of hostility toward union organizing and must not be coercive in nature; and the questions must not pry into other union matters, elicit information concerning the employee's subjective state of mind, or otherwise interfere with the statutory rights of employees. 146 NLRB at 775.

reliable evidence available, and specifically identified tape recordings as an especially dependable form of evidence. The Committee reviewed the method for authenticating and introducing a tape recording as evidence and set forth the advantages of using the recording as part of the General Counsel's case-in-chief versus reserving the recording until respondent's witnesses testified on direct examination, presumably denying the recorded evidence. The Committee also noted, however, that it is essential that any testimony provided by witnesses on behalf of the General Counsel be consistent with the contents of the tape recording.

Unfortunately, this caution was offered too late for one case reviewed by the Committee. In this case, a discriminatee's testimony about what was said during conversations with respondent's representatives was not supported by tape recordings that the employee made of these conversations. This apparent inconsistency was used by the ALJ as one of his reasons for discrediting the witness. On this same subject, in other cases reviewed by the Committee, the counsel for the General Counsel presented multiple witnesses who offered sharply divergent accounts of the facts or testified in a manner that was inconsistent with correspondence or other documents that had been offered into evidence. In each instance, the ALJ relied on these inconsistencies to discredit the General Counsel's witnesses.

Bad things and bad witnesses happen in every trial. However, in all but the most unusual situations, inconsistencies between witnesses' versions of facts and other evidence in the case, regardless of its nature, must be uncovered during the investigation. Such inconsistencies must be weighed before a decision is made to issue complaint. In most circumstances, before proceeding further, the witnesses should be given an opportunity to explain why their testimony varies from other evidence gathered during the investigation. For example, if a tape recording does not substantiate a witness' account of a conversation, the witness' ability to explain why should provide a good means of assessing the credibility of the testimony and would assist a Region in determining whether it is likely to get a favorable credibility determination if it proceeds to trial.

Likewise, if the witnesses' chronology of events seems to conflict with correspondence in the case, the witnesses should be confronted with the correspondence and asked to reconcile their timeline with the letters. For example, if there is a dispute about whether the union sent or the employer received a letter identifying the members of the union's organizing committee, and the evidence reveals that all other letters were sent by certified mail, and that the union sent a subsequent letter to the employer informing it of its organizing efforts, the union's witnesses should be asked why the disputed letter was not sent by certified mail, and also why it sent the seemingly redundant second letter announcing its organizing efforts, if the union had already sent a letter to the employer identifying the members of its committee.

If the charging party's witnesses provide substantially different timelines as to when the employees started an organizing drive in a case where establishing knowledge is critical, the witnesses, especially those who place the commencement of the drive at an earlier date, should be asked why their recollections are so different.

In each of these instances, the witnesses' ability to explain any inconsistency that exists between their testimony and other evidence in the case should be taken into consideration when deciding whether to issue complaint and/or whether to present their testimony at trial. Similarly, a charged party's ability to account for apparent differences between its version of the facts and other evidence that has been gathered in the case will presumably impact any determination on whether complaint should issue. Inconsistencies should not be ignored, and if a decision to issue complaint

is made, a strategy must be developed for overcoming the possible inconsistencies in the charging party's version and presenting a consistent, coherent story at trial.

In most cases, facts are disputed and ALJs are forced to make credibility resolutions. If counsel for the General Counsel does not have a plan to account for inconsistencies in the evidence and cannot present the ALJ with a coherent version of events, this gives the judge a convenient basis for resolving credibility disputes against the General Counsel.

Inconsistencies that are not disclosed by the investigation presumably would be discovered during pre-trial preparation. The same evaluation process should be utilized when pre-trial preparation uncovers inconsistencies in the witnesses' stories. Namely, the Region should ask whether the inconsistencies can be explained and is there a clear coherent story that will be credited by an ALJ.

After a Region decides how to proceed, the presentation of evidence must be consistent with that story. If a single witness provides a version that varies from everyone else's, such as placing the start of a union organizing drive at a much later date than all the other evidence indicates, counsel for the General Counsel should give serious consideration as to whether that witness should testify.

In addition, if during pre-trial preparation, witnesses recall important information that was not recorded in their affidavits, counsel for the General Counsel must be prepared to explain why the witnesses' testimony should be believed even though certain important information was omitted from earlier affidavits.

#### **G. Explain on the Record the Failure to Call an Important Witness**

In a few cases the Committee reviewed, it was unclear why counsel for the General Counsel did not call certain witnesses to testify even though they were present for a particular conversation or otherwise would appear to be important witnesses. On occasion in these situations, the administrative law judge's decision has suggested that an adverse inference may be appropriate or that at the very least an adverse credibility determination could be made by the ALJ because of the failure to explain why a witness has not testified in support of the General Counsel's case.

Sometimes there is good reason for the failure of the witness to testify. Perhaps, counsel for the General Counsel did not call the individual as a witness because he or she was not believed to have relevant or important enough testimony. Other times, counsel for the General Counsel may have made a deliberate decision not to call a witness to testify because the witness would have provided adverse or at least unhelpful testimony because he or she was a poor witness. Under either of these circumstances, there is no need or reason to explain on the record the failure to call a witness.

However, there are situations where the testimony of a witness will support an important part of the testimony of another General Counsel witness or will establish an essential element of the case. For example, the witness may have been present for a critical conversation between a discriminatee and a supervisor, both of whom have testified but who gave diametrically opposed testimony. If the witness is another employee or someone whose interests would not otherwise be adverse to the discriminatee, the importance of that witness' testimony to the ALJ's credibility resolution could be significant. Yet, if despite counsel for the General Counsel's best efforts, either

through the issuance of a subpoena or otherwise, counsel is unable to obtain the presence of the witness on the day of trial, an explanation on the record for that absence may be warranted. This may be useful either as a prelude to seeking subpoena enforcement through a postponement of the hearing or at least in order to avoid an adverse inference or credibility determination if a decision has been made to close the record without the witness' testimony. If the ALJ either denies a postponement request to seek enforcement of a subpoena or nevertheless makes an adverse credibility resolution despite the explanation from counsel for the General Counsel, there is a record as to the efforts to obtain the witness' testimony, which would support exceptions if they are filed.

While it is not appropriate for counsel for the General Counsel to "testify" in Board proceedings without approval, it is appropriate as an officer of the court to truthfully represent the whereabouts or the efforts to secure the presence of an important witness. Presumably, there are also documents that can be entered into the record to support these assertions, such as subpoenas, cover letters, envelopes or certified mail receipts marked "undeliverable." An ALJ's refusal to give any weight to such representations or to allow admission of documents into the record is no reason to abandon that effort. It is important to preserve the record for potential review on appeal through requesting documents be placed in a rejected exhibit file.

In the example described above, if the potential employee witness to the conversation between the discriminatee and supervisor has left the respondent's employment by the time of trial and fails to respond to efforts to contact him, it may be appropriate for counsel for the General Counsel to represent to the ALJ that the witness was subpoenaed at his last known address, that the subpoena was returned to the Region as "undeliverable" and/or "no forwarding address," and that the witness failed to respond to letters to his last known address or to efforts to contact him by telephone at his last known phone number. Documentary support for these representations should be offered into evidence, if available. By making such a record regarding the Region's efforts to produce the witness at trial, counsel for the General Counsel may succeed in averting an adverse credibility determination by the ALJ based on the failure to call the missing witness, and such a record may also lay the groundwork for seeking the admission of that witness' affidavit, if one has previously been provided.

Of course, there are an infinite number of circumstances and reasons why the presence of an important witness could not be secured by counsel for the General Counsel. Discretion must be exercised by counsel in deciding whether it is appropriate to make an explanation on the record as to why a witness is not present to testify. It is critical that counsel always be truthful and accurate in providing any explanation for the record and be prepared to support that explanation with documents, whenever possible.

#### **H. When Considering Exceptions, "Know when to hold 'em and know when to fold 'em"**

As a threshold matter, the decision whether to file exceptions should depend upon a thorough review of the evidence presented at trial, the case law, and the basis upon which the judge ruled against the General Counsel. Exceptions should only be filed if there is a reasonable possibility of success. (Section 10438.3 of Casehandling Manual in Unfair Labor Practice Proceedings) In applying this standard, if the dismissal is based upon credibility resolutions, it is not appropriate to file exceptions since it is the policy of the Board not to overrule credibility findings by the administrative law judge unless the clear preponderance of all the relevant evidence supports reversal. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d

Cir. 1951). In applying *Standard Dry Wall Products*, the Board rarely reverses credibility determinations. On occasion, to avoid the Board upholding a finding that appears to be grounded in a credibility determination, Regions have attempted to support exceptions by arguing that a particular finding is actually based on an erroneous application of legal principles or a misreading of the record evidence. Regions should be cautious in pursuing this approach because when an ALJ's determination is susceptible to the interpretation that it was based on credibility, the Board will usually uphold the determination on that basis.

Notwithstanding the high threshold applicable to the decision about whether to file exceptions, during the review of the significant losses this year, the Committee discussed several decisions where the administrative law judge had dismissed the complaint based on the assessment that the discriminatee's conduct lost the protection under an *Atlantic Steel* analysis or determined that the respondent's defense met its burden under *Wright Line*. In reviewing these decisions, the Committee agreed that the Region's decision to issue complaint was appropriate and disagreed with the judges' analysis that the conduct was so egregious that it lost the protection of the Act or that the evidence established a viable *Wright Line* defense. Exceptions were filed in these cases and, recently, the Board overruled the ALJ in two such cases. In these cases, the Board adopted the General Counsel's theory of the violation under the *Atlantic Steel* analysis. Furthermore, the Board stated in a footnote that the alternative analysis under a *Wright Line* standard was inapplicable.

Another decision reviewed involved a situation where counsel for the General Counsel filed exceptions covering one discriminatee, even though the complaint alleged that the same unlawful conduct encompassed two employees and there was no apparent basis for distinguishing between the two individuals in the ALJ's rationale for dismissal. In another case, the Committee concluded that the Region had strong grounds for filing exceptions but chose not to do so. These cases underscore the need to exercise great care in determining whether to file exceptions.

It is important to be proactive when litigating cases and, where appropriate, when filing exceptions. When filing exceptions, counsel for the General Counsel should also except to any failure by the judge to make findings of fact that were litigated and that support our theory of the case but that were not referenced in the judge's decision. On the other hand, when the ALJ's findings of fact and legal analysis leave no reasonable basis to anticipate a reversal by the Board, the Region should decline to file exceptions.

## **Conclusion**

The Committee recommends to the Acting General Counsel that this report be disseminated to all field employees through an OM memorandum and be the subject of a professional training session.